

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CATHY L. GROVER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,660
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from an Award entered by then Assistant Director Brad E. Avery on February 27, 1998. The Appeals Board heard oral argument October 23, 1998. Stacy A. Parkinson was appointed Board Member Pro Tem to serve in place of Board Member Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

Diane F. Barger of Wichita, Kansas, appeared on behalf of claimant. Gregory D. Worth of Lenexa, Kansas, appeared on behalf of respondent, a qualified self-insured. Derek R. Chappell of Ottawa, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award. The stipulations also include a separate stipulation regarding liability of the Workers Compensation Fund. Respondent and the Fund have stipulated that the Fund will be liable for 50 percent of the benefits if the disability is determined to be a whole body disability.

**ISSUES**

The Assistant Director awarded 10 percent loss of use of the left forearm. In the application for review, claimant lists only one issue, nature and extent of disability. But in the brief, claimant lists: (1) compensability; (2) nature and extent of disability; (3) future medical expenses; (4) unauthorized medical treatment; and, (5) denial of claimant's motion for permission to submit rebuttal testimony.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds claimant should be entitled to benefits based on a work disability of 49.5 percent. Claimant's request to remand the case for rebuttal testimony is denied. Claimant is entitled to future medical expenses upon application to and approval of the Director. Claimant is entitled to unauthorized medical expenses as stated in the Award.

#### **Findings of Fact**

1. Claimant worked for respondent from September 13, 1993, through December 22, 1993.
2. On October 5, 1993, claimant felt a "boing" in her left wrist when she flipped a bone. She also felt a tingling in her fingers of her left hand and in her wrist.
3. During the period of her employment, she developed problems with both upper extremities, including both shoulders, as a result of the repetitive work activities.
4. Dr. James N. Glenn provided the authorized treatment from December 10, 1993, through September 21, 1994. To Dr. Glenn, claimant described the incident of October 5, 1993, as a feeling that something popped. Claimant's initial complaints to Dr. Glenn were of problems with her left wrist and hand, right thumb, and right shoulder. Dr. Glenn performed surgery on the left in January 1994, including carpal tunnel release. Dr. Glenn testified to his opinion that the incident of October 1993, probably did not cause the carpal tunnel syndrome but indicated such an incident can cause swelling which may contribute to carpal tunnel syndrome. Dr. Glenn noted puffiness in the left wrist when he first saw claimant on December 10, 1993. Dr. Glenn opined that repetitive hand activities would be a more likely cause and also testified that using a wizard knife, as claimant had done, could contribute.

On July 19, 1994, Dr. Glenn indicated his diagnosis was: (1) status post left carpal tunnel release with incomplete relief; (2) subacromial bursitis impingement of the right shoulder; and, (3) subluxing of the left ulnar nerve at the cubital tunnel. But Dr. Glenn ultimately concluded claimant had no permanent impairment. He did recommend restrictions against heavy or repetitive work but testified the restrictions were because of her diminutive size, not because of injury from work.

5. Dr. P. Brent Koprivica performed an independent medical evaluation at the request of the Administrative Law Judge. In his opinion, claimant suffered, from the event of October 5, 1993, disruption of the palmaris longus tendon and developed carpal tunnel syndrome. For these conditions, he rated the impairment as 10 percent of the left upper extremity at the level of the wrist.

Dr. Koprivica also concluded claimant suffered, as a result of repetitive work activities, cubital tunnel syndrome on the left and bilateral impingement syndromes with symptoms into the neck area. For these cumulative trauma disorders, Dr. Koprivica assigned an 11 percent whole person impairment.

6. Dr. Koprivica reviewed a list of the work tasks claimant had performed during the 15 years before the accident and concluded claimant could not perform 7 of 9, or 78 percent, of those tasks.

7. Monty D. Longacre gives testimony that claimant should be able to do some types of clerical work and mentions a best-case scenario of a wage of \$6.50 per hour in a secretarial position. He does not state what she is in fact likely to earn. The Board finds she retains the ability to earn minimum wage of \$5.15 per hour, or \$206 per week, for a 21 percent loss when compared to the \$260 per week she was earning at the time of the injury.

8. Although claimant was not working or earning a wage at the time of the regular hearing in this case, the Board finds she has not made a good faith effort to find work. She had looked some for a job, but the record indicates only minimal effort. She testified she looked in Emporia at the convenience stores, at Wal-Mart, and at Emporia State. She also stated she had called someone about vocational testing. The Board concludes this evidence does not satisfy claimant's burden of proving she made a good faith effort to find employment.

9. In the course of the deposition of Dr. Glenn, a deposition taken by respondent after claimant's terminal date had passed, claimant's counsel asked Dr. Glenn if he had reviewed the records from the IBP dispensary. When Dr. Glenn indicated he had not, claimant's counsel asked Dr. Glenn to assume those records reflected various complaints which included both upper extremities. Respondent's counsel objected to any questions from those IBP records on grounds that those records were not in evidence. Dr. Glenn testified in general that the complaints were similar to those made to him. Claimant's counsel later asked the ALJ to extend the terminal date and now asks the Board to remand the case to give claimant the opportunity to put those records in as rebuttal evidence.

### **Conclusions of Law**

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board finds claimant has proven a general body disability. Although Dr. Glenn concluded claimant has no impairment, he did perform surgery and his records include significant right shoulder complaints as well as the left upper extremity complaints. These complaints and the bilateral impairment are further documented in the examination by Dr. Koprivica.

3. The Board finds the date of accident for claimant's general body injury is the last day worked, December 22, 1993. *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

4. For a general body injury the measure of disability is defined in K.S.A. 44-510e. Work disability is there defined as the average of wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. If a claimant does not make a good faith effort to find work after the injury, a wage is to be imputed based on all relevant factors, including expert testimony. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. Because claimant did not make a good faith effort to find employment, the Appeals Board finds a postinjury wage of \$206 per week should be imputed to claimant and that the wage prong of the work disability formula should, therefore, be 21 percent.

7. Claimant has a work disability of 49.5 percent based on a task loss of 78 percent and a wage loss of 21 percent. K.S.A. 44-510e.

8. The Board finds the claim shall not be remanded for the purpose of allowing claimant to introduce the IBP dispensary records. The Board agrees with the decision by the Assistant Director on this issue, finding that those records were not rebuttal to anything Dr. Glenn said in his deposition. Claimant had the opportunity to put the records into evidence in the case before claimant's terminal date.

9. Claimant may be entitled to future medical expenses upon application to and approval by the Director.

10. Claimant is entitled to unauthorized medical expense upon proper presentation to respondent of evidence of such expense and the amount of same.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by then Assistant Director Brad E. Avery on February 27, 1998, should be, and is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Cathy L. Grover, and against the respondent, IBP, Inc., a qualified self-insured, and the Kansas Workers Compensation Fund, with each to be responsible for 50% of the benefits awarded in accordance with the parties' stipulation of November 13, 1996, for an accidental injury which occurred December 22, 1993, and based upon an average weekly wage of \$260, for 44 weeks of temporary total disability compensation at the rate of \$173.34 per week or \$7,626.96, followed by 191.07 weeks at the rate of \$173.34 per week or \$33,120.07, for a 49.5% permanent partial disability, making a total award of \$40,747.03, all of which is presently due and owing in one lump sum, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
Derek R. Chappell, Ottawa, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director